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INTERNATIONAL LAW THROUGH THE LOOKING GLASS OF ISDS

This panel was convened at 2:00 p.m. on Friday, April 5, 2024 by its moderator, Andreas Kulick, who introduced the speakers: Ibironke Odumosu-Ayanu, Ina Popova, Martins Paparinskis, and Robert Howse.

INTRODUCTORY REMARKS BY ANDREAS KULICK*

International law is omnipresent in investor-state dispute settlement (ISDS). Immediately, this rings true with respect to the customary rules of treaty interpretation, enshrined in Articles 31–33 of the Vienna Convention on the Law of Treaties—every treaty-based investment dispute requires treaty interpretation. But international law's prominence in ISDS extends way beyond that: matters of general international law, such as international responsibility, state succession, immunity or international procedure feature frequently in investment disputes,[1] as do questions pertaining to investment law's relationship to other specialized areas of international law, such as international human rights or environmental law. This panel primarily focuses on general international law, investigating specifically the roles it plays in ISDS, the direction as well as the forms of its interaction with international investment law. In addition, it considers the interaction and interconnectedness of investment law with other specialized areas of international law, notably pertaining to matters of human rights and sustainable development.

As regards general international law, it can take on at least three roles vis-à-vis investment law, which may overlap. First, in its incarnation as secondary rules, it provides what Pierre-Marie Dupuy called the "common grammar"[2] of all specialized areas of international law: The shared "rules about rules"[3] on how to interpret a treaty or to attribute conduct to a state. Second, general international law may serve as a gap-filler. As held in *Micula (I)*, investment tribunals "will certainly apply residually international law if the other applicable rules are silent or obscure or are eventually determined not to apply *ratione temporis*."[4] Third, investment tribunals resort to

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[1] For a detailed analysis of its interaction with international investment law, see GENERAL INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW – A COMMENTARY (Andreas Kulick & Michael Waibel eds., 2024). For a definition of the term "general international law," see Andreas Kulick & Michael Waibel, *General International Law in International Investment Law*, *in* GENERAL INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW – A COMMENTARY, *supra* note 1, at 1, 5–7.

[2] Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law*, 1 EUR. J. L. STUD. 4 (2007).

[3] HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW 94 (3d ed. 2012).

[4] Micula and Others v. Romania, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/05/20, para. 151 (2008).

general international law, here mostly to primary rules such as the international minimum standard to denial of justice, if the investment law as a special regime fails or does not function properly.[5]

Besides such roles, the direction and forms of interaction between general international law and international investment law are of import. General international law may be "inward-flowing," i.e., influence investment law and jurisprudence, or ISDS practice itself may be "outward-flowing," i.e., the case law of investor-state tribunals impacting on general international law.[6] Further, the ISDS tribunal's jurisprudence may align with the case law of the International Court of Justice (ICJ) or other international courts and tribunals in the interpretation and application of a norm of general international law—or it may partly or fully deviate from ICJ or other international practice.[7]

The following contributions in this panel investigate the relationship of international law and investment law through these analytical lenses—with a specific attention to how investment arbitration may contribute to the development of (general) international law. Ina Popova takes a closer look at international procedural law and how general international law has influenced ISDS practice. Martins Paparinskis inquires into matters of compensation as a sub-question of state responsibility, where ISDS practice has been of particular prominence. Finally, in her contribution, Ibironke Odumosu-Ayanu considers the interconnectedness between international law and ISDS from a Global South perspective, placing particular emphasis on matters of sustainable development and the lives and livelihoods of Indigenous peoples.

Remarks by Ina Popova*

I will discuss three examples where international law has influenced the development of investor-state practice: the meaning of a "dispute" (Part I), abuse of process (Part II), and (briefly) the cross-pollination of judicial and arbitral reasoning, on which Professor Paparinskis will elaborate (Part III).

I. Meaning of "Dispute"

Under many investment treaties, the nature of the dispute before the tribunal and the point in time when it arose can affect the tribunal's jurisdiction. At the same time, some treaties do not define the term "dispute," leading tribunals to apply the usual principles of treaty interpretation under international law.

In doing so, investment tribunals have repeatedly applied the axiomatic definition in the 1924 decision of the Permanent Court of International Justice (PCIJ) in *Mavrommatis Palestine Concessions*: "a disagreement on a point of law or fact, a conflict of legal views or of interests."[1]

[5] *See generally* Int'l L. Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Fifty-Sixth Sess., II ILC Y.B. 114, para. 319 (2004).

[6] *See* Christian J. Tams, Stephan W. Schill & Rainer Hofmann, *Radiating Effects: The Gentle Impact of International Investment Law on General International Law*, *in* International Investment Law and General International Law – Radiating Effects? 4 (Christian J. Tams, Stephan W. Schill & Rainer Hofmann eds., 2023). For a detailed analysis of various provisions of general international law, see the contributions in General International Law in International Investment Law – A Commentary, *supra* note 1.

[7] For a summary of the analysis of alignment and deviation see Andreas Kulick & Michael Waibel, *General International in International Investment Law*, *in* General International Law in International Investment Law – A Commentary, *supra* note 1, at 18–19.

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[1] Mavrommatis Palestine Concessions (Greece v. UK), Objections to the Jurisdiction of the Court, 1924 PCIJ (ser. A) No. 2, at 11 (Aug. 30).

The Permanent Court and the International Court of Justice (ICJ) provided further guidance in the context of jurisdiction *ratione temporis* in *Phosphates in Morocco*, *Legality of Use of Force*, and *Certain Property*.[2] These judgments held that post-ratification disagreements fall outside the Court's temporal jurisdiction if they presume the existence of, or are merely the confirmation or development of, earlier situations that constitute the real cause of the dispute. In *Ukraine v. Russia*, the ICJ applied the *Mavrommatis* definition to determine whether a dispute existed under the Genocide Convention, emphasizing that whether a dispute exists between the parties is a matter for objective determination on the facts.[3]

When assessing temporal jurisdiction, investment tribunals have applied the *Mavrommatis* definition of "dispute" and emphasized the need for a fact-sensitive analysis. Tribunals have considered whether the dispute before them has a common "cause or background," "central" "facts or considerations," "origin or source," "real cause" or "subject matter" with the pre-treaty dispute.[4] In *EuroGas v. Slovakia*, for example, the tribunal held that a dispute "does not require the expression of all possible legal arguments and grounds in support of one's position"; rather, it depends on whether there has been "an articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim."[5] More recently, in *Micula v. Romania*, the tribunal considered if the post-treaty dispute was "a manifestation of the action of the [state]" that had given rise to the pre-treaty dispute.[6]

II. Abuse of Process

The doctrine of abuse of process derives from good faith and, to that extent, reflects a general principle of law. One reported early modern precedent is a 1577 judgment from the court of appeal in Aix-en-Provence: the court ruled that a wool comber who indulged in singing loudly and continuously, for the sole purpose of annoying a neighboring attorney, had abused his right to sing and ordered that he pay the lawyer damages.[7] A similar tort exists as a cause of action at common law.[8]

International courts and tribunals have applied an analogous principle in interstate relations. For example, in an 1892 dispute between the United Kingdom and the United States, it was accepted that the United States could complain to an international tribunal if it found evidence that British sailors were hunting seals for the malicious purpose of injuring the interests of American trappers without regard for their own profit.[9]

More recently, abuse of process has emerged as an entirely tribunal-made feature in investment treaty arbitration. Like in the early cases, tribunals have derived the doctrine from the principle of good faith. But unlike in early cases, they have applied it not as a sword but as a shield: as a defense by the respondent state that would render claims inadmissible even though they fall within the

[2] Phosphates in Morocco (It. v. Fr.), Judgment, 1938 PCIJ (ser. A/B.) No. 74, at 24 (June 14); Legality of Use of Force (Serb. and Mont. v. Belg.), Preliminary Objections, 2004 ICJ Rep. 279, para. 43 (Dec. 15); Certain Property (Liech. v. Ger.), Preliminary Objections, 2005 ICJ Rep. 6, para. 24 (Feb. 10).

[3] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order of Provisional Measures, paras. 28–35 (ICJ Mar. 16, 2022); *see also, e.g.*, Dispute over the Status of the Waters of the Silala (Chile v. Bol.), Merits, 2022 ICJ Rep. 614, para. 39 (Dec. 1).

[4] *See, e.g.*, Lucchetti v. Peru, ICSID Case No. ARB/03/4, Award, paras. 50, 53, 58–59 (2005); MCI v. Ecuador, ICSID Case No. ARB/03/6, Award (2007), paras. 65–66.

[5] EuroGas Inc. et al. v. Slovakia, ICSID Case No. ARB/14/14, Award, para. 437 (2017).

[6] Micula et al. v. Romania (II), ICSID Case No. ARB/14/29, Award, para. 299 (2020).

[7] *See* Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 Pac. L.J. 37, 43 (1995).

[8] *See, e.g.*, Restatement (Second) of Torts, § 682.

[9] *See* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 121–22 (1953).

tribunal's jurisdiction. The first tribunal to reject an investor's claim as an abuse of process was the one in *Phoenix Action v. Czechia* in 2009.[10] Since then, tribunals have progressively defined the contours of the doctrine, including to exclude abusive restructurings for the sole purpose of creating jurisdiction after the treaty dispute had already arisen.[11] The tribunal in *Orascom v. Algeria* applied the concept in the context of parallel proceedings despite an earlier settlement. The tribunal did so on the basis that "abuse of process was a general principle applicable in international law as well as municipal law."[12]

One year after *Orascom*, the ICJ addressed abuse of process in *Immunities and Criminal Proceedings*. The Court acknowledged the principle but recognized that it never found a case that had met the standard, and held it would apply the principle only in "exceptional circumstances."[13] In her separate opinion, Judge Donoghue noted that she was "not aware of any authoritative definition of either term in the context of international adjudication,"[14] but would nonetheless have dismissed the case on its facts as an improper exercise of the Court's judicial function.

III. Cross-pollination of Case Decisions

Investment tribunals apply PCIJ and ICJ cases as statements of international law. The ICJ understandably does not apply the reasoning of investor-state tribunals in the same way.[15] In *Obligation to Negotiate Access to the Pacific Ocean*, for example, the Court reasoned that, although "references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State," "[i]t does not follow from such references that there exists in general international law a principle . . . of . . . legitimate expectation[s]."[16]

Compensation for unlawful state acts is one area where arbitration cases can offer guidance. In *Costa Rica v. Nicaragua* and *DRC v. Uganda*, the Court referred to "the practice of other international courts and tribunals" in applying pre- and post-judgment interest.[17] Investment tribunals, in turn, apply the canonical standard of full reparation articulated in *Factory at Chorzów* as the legal standard for damages for treaty breach.[18] As a result, there are myriad tribunal decisions—often with the benefit of expert evidence—that are potentially helpful in calculating "financially

[10] *See* Phoenix Action Ltd. v. Czechia, ICSID Case No. ARB/06/5, Award, para. 144 (2009).

[11] *See* Levy et al. v. Peru, ICSID Case No. ARB/11/17, Award, para. 195 (2015); Philip Morris v. Australia, PCA Case No. 2012-12, Award on Jurisdiction, para. 554 (2015).

[12] Orascom v. Algeria, ICSID Case No. ARB/12/35, Award, para. 541 (2017) (referring to abuse of process as a "general principle applicable in international law as well as municipal law" (quoting Robert Kolb, *General Principles of Procedural Law*, *in* The Statute of the International Court of Justice: A Commentary 904 (Andreas Zimmermann et al. eds., 2d ed. 2012)).

[13] Immunities and Criminal Proceedings (Eq. Guin. v. Fr.), Preliminary Objections, 2018 ICJ Rep. 292, paras. 150–51 (Dec. 11).

[14] *Id.*, paras. 3, 6, 19 (diss. op., Donoghue, J.).

[15] *See, e.g.*, Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID Rev. 223, 225 (2013) (noting that the ICJ has rarely cited arbitration cases).

[16] Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Merits, 2018 ICJ Rep. 507, paras. 160–62 (Oct. 1).

[17] Armed Activities on the Territory of the Congo (DRC v. Uganda), Reparations, 2022 ICJ Rep. 13, paras. 401–02 (Feb. 9); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Compensation, 2018(I) ICJ Rep. 15, paras. 154–55 (Feb. 2).

[18] *See, e.g.*, PJSC DTEK Krymenergo v. Russia, PCA Case No. 2018-41, Award, para. 840 (2023) ("The relevant principle was originally formulated in the seminal judgement of the Permanent Court of International Justice in the *Chorzów* case: reparation must wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach.").

assessable damage including loss of profits" for purposes of Article 36 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.[19]

Remarks by Martins Paparinskis*

Can arbitral decisions rendered in investor-state dispute settlement contribute to the development of international law? That is a large question, where much will turn on the fine print and generalizations are best avoided.[1] I will focus on the narrower point of interaction between investment arbitration and the international law of compensation. I will first explain that investment arbitration awards are a subsidiary means for the determination of rules of international law (Part I) and then suggest that they can be employed to confirm recognized principles (Part II), identify the relevant circumstances for the application of these principles (Part III), or even highlight tensions with either the underlying assumptions (Part IV) or the principles as such (Part V).

I. Subsidiary Means for the Determination of Rules of International Law

Decisions by investor-state arbitration tribunals are a subsidiary means for the determination of international law. In *Certain Iranian Assets,* the International Court of Justice (ICJ or Court) noted reliance by both parties on these decisions and itself cited one such an award.[2] The International Law Commission (ILC) stated that "[s]ubsidiary means for the determination of rules of international law include . . . decisions of courts and tribunals,"[3] explaining in the commentary that it also captures investment tribunals.[4] Indeed, most decisions on provisions of the 2001 ILC Articles on Responsibility of States For Internationally Wrongful Acts (2001 ILC Articles) relating to compensation come from investor-state arbitration.[5] Ina Popova made a similar point earlier.

Of course, a subsidiary means is not a source of international law.[6] And to say that investment arbitration awards are admissible as a subsidiary means is a proposition distinct from the assessment of their weight,[7] where the quality of reasoning is a key consideration.[8] Still, the overall structure of the field suggests a degree of caution as a sensible starting point for an inquiry into the weight of these decisions, at least on general issues. Relevant considerations include the mostly decentralized substantive rules and dispute settlement bodies; narrow and specialized scope of jurisdiction for such bodies; selection of most adjudicators without requirements for, or formal vetting of, expertise in public international law; what some would view as a degree of inconsistency, at least in relation to articulation and application of rules; and the occasionally lukewarm reception by

[19] Int'l L. Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, II. ILC Y.B., Art. 36, cmt. para. 22 (2001).

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[1] *See* General International Law in International Investment Law: A Commentary (Andreas Kulick & Michael Waibel eds., 2024).

[2] Certain Iranian Assets (Iran v. U.S.), Judgment, 2023 ICJ Rep. 51, paras. 53, 185 (Mar. 30).

[3] Int'l L. Comm'n, Draft Conclusions on Subsidiary Means for the Determination of International Law, Report on the Work of the Seventy-Fourth Session, at 73, UN Doc. A/78/10 (2023) (Draft Conclusion 2, subpara. (a)).

[4] *Id.* at 82, paragraph (7) of the commentary to draft conclusion 2.

[5] Int'l L. Comm'n, Materials on the Responsibility of States for Internationally Wrongful Acts 396–414 (2d ed. 2023).

[6] Texts and Titles of Draft Conclusions 6, 7 and 8 as Provisionally Adopted by the Drafting Committee on 16, 21 and 22 May 2024, Draft Conclusion 6, para. 1, UN Doc. A/CN.4/L.999 (May 28, 2024).

[7] 2023 Draft Conclusions, *supra* note 3, Draft Conclusion 3; 2024 Draft Conclusions, *supra* note 6, Draft Conclusion 8.

[8] 2023 Draft Conclusions, *supra* note 3, Draft Conclusion 3, subpara. (b).

states and other entities.[9] Indeed, the Court's favorable treatment of investment arbitration decisions in relation to a substantive investment protection standard[10] may be contrasted with its skepticism when such decisions were invoked on a point of general international law.[11]

II. Confirmation of Recognized Principles

A common type of engagement with questions of compensation is the confirmation of generally recognized principles as the starting point for determination of compensation in investment arbitration. By way of example, the annulment committee in *EDF International SA and Others v. Argentina* described "the principle that the purpose of damages is to place the injured party, as nearly as possible, in the position which it would have occupied had the wrongful act not occurred" as "so well established in international law as to require no discussion."[12] In some decisions the recognized principles are summarized and expressed with such clarity that the reasoning could be relied upon in other settings where content of state responsibility is considered. The award in *Pey Casado v. Chile (II)* is an example.[13]

Whether the recognized principles are applicable in investor-state arbitration may itself be a subject of discussion. The ILC expressed Part Two of the 2001 ILC Articles, including compensation, as without prejudice to any right accruing directly to any person or entity other than a state; the commentary explains that those would include "rights under bilateral or regional investment protection agreements."[14] The ILC as well as the ICJ have not drawn a sharp distinction between materials relevant for formulating rules on compensation in interstate legal relations as opposed to other settings, so reliance on the 2001 ILC Articles in investment arbitration does not go against the general grain.[15] Still, the without-prejudice expression in the 2001 ILC Articles provides flexibility for the inquiry into whether there may be reasons to adjust, as appropriate, the principles of content of state responsibility to claims for breach of treaty brought by individuals.[16]

III. Application of Recognized Principles

A principle relating to compensation, while recognized, may be articulated in vague terms with little relevant practice to provide guidance on application. That is a concern: "those principles must be capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of this case, but by comparison with other cases."[17]

[9] Particularly *id*. Draft Conclusion 3, subparas. (a), (c), (e), (f); 2024 Draft Conclusions, *supra* note 6, Draft Conclusion 8, subparas. (a), (b).

[10] *Certain Iranian Assets*, *supra* 2, para. 185.

[11] Obligations to Negotiate Access to the Pacific Ocean (Bol. v. Chile), 2018 ICJ Rep. 507, para. 162 (Oct. 1); *see also* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, Judgment, 2007 ICJ Rep. 582, para. 90 (May 24).

[12] EDF International SA and Others v. Argentina, ICSID Case No. ARB/03/23, Decision of the Annulment Committee, para. 371 (Feb. 5, 2016).

[13] Victor Pey Casado and President Allende Foundation v. Chile (II), ICSID Case No. ARB/98/2, Award, paras. 204–06, 217–18, 232 (Sept. 13, 2016).

[14] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/CN.4/SER.A/2001/Add.1, 2 ILC Y.B., at 26 (2001) (Art. 33, para. 2; para. (4) of the commentary to Art. 33).

[15] *Id.*, paras. (6), (19), (27), (32) of the Commentary to Art. 36, also nn. 515–16, 520–22, 524, 546–47, 549, 550, 553, 555–60, 564–66, 570, 576, 579; Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation, Judgment, 2012 ICJ Rep. 324, para. 13 (June 19).

[16] MTD Equity Sdn. Bhd. v. Chile, ICSID Case No. ARB/01/7, Decision on Annulment, paras. 63–64 (Mar. 21, 2007).

[17] *Diallo*, *supra* note 15, at 391, para. 7 (dec., Greenwood, J.).

Investment tribunals have therefore provided granularity to the relevant circumstances of application of principles such as mitigation[18] and contribution.[19]

IV. Tension with Underlying Assumptions

On one view, the amount of financial compensation occasionally awarded in investment arbitration challenges certain underlying assumptions of the modern law of state responsibility, in particular the choice of the ILC not to provide a particular rule regarding "disproportionate and even crippling" compensation.[20] Pierre-Marie Dupuy has pointed out that:

> the question of crippling reparation seems today to be posed with greater acuity than in the aftermath of the adoption of the [2001 ILC Articles], whose provisions do not favour the idea that the amount of reparation should take into account the financial capacities of the responsible State. Certain cases undoubtedly encourage reconsideration of this position, in particular in situations where it is clear that the State will not be able to meet the accumulation of certain reparation debts.[21]

The Court left the issue open in the judgment on reparations in the case concerning *Armed Activities on the Territory of the Congo*.[22]

V. Tension with Recognized Principles

Finally, some decisions may be in tension with recognized principles. On one view, decisions on the award on moral damages fall within this category. The concern is not about the well-recognized principle of including moral damage in the injury for which the state is under an obligation to make full reparation.[23] Rather, the question is whether the breach of primary obligations solely directed at the protection of objects is capable of giving rise to "individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life."[24] Several cases where moral damages were awarded or considered capable of being awarded in principle addressed rules that were expressed in such terms.[25]

I will conclude with two points. First, investment arbitration has clearly made a quantitatively impressive contribution to the international law of compensation. Second, its impact on the development of these rules may be less clear, and will depend on a variety of considerations, particularly the quality of reasoning of particular decisions and the fit of the argument within the overall international legal process.[26]

[18] William Richard Clayton and Others v. Canada, PCA Case No. 2009-04, Award on Damages, paras. 195–219 (Jan. 19, 2019).

[19] Copper Mesa Mining Corporation v. Ecuador, PCA Case No. 2012-2, Award, paras. 6.93–6.97 (Mar. 15, 2016); Bear Creek Mining Corporation v. Peru, ICSID Case No. ARB/14/21 (Sept. 12, 2017) (partial diss. op., Sands, Arb.).

[20] 2001 ILC Articles, *supra* note 14, para. (4) of the Commentary to Art. 34. *See also* Third Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/SER.A/2000/Add.1, 2 ILC Y.B., paras. 41–42, 162–63.

[21] Pierre-Marie Dupuy, *Concluding Remarks: ARSIWA – A Reference Text Partially Victim of Its Own Success?*, 37 ICSID Rev. – For. Investment L.J. 601, 617 (2022).

[22] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Reparations, 2022 ICJ Rep. 13, paras. 110, 407 (Feb. 9).

[23] *Diallo*, *supra* note 15, para. 18; 2001 ILC Articles, *supra* note 14, Art. 31, para. 2; para. (1) of the Commentary to Art. 36.

[24] 2001 ILC articles, *supra* note 14, para. (5) of the Commentary to Art. 31.

[25] Desert Line Project LLC v. Yemen, ICSID Case No. ARB/05/17, Award, paras. 191, 289–90 (Feb. 6, 2008); Quiborax SA and Other v. Bolivia, ICSID Case No. ARB/06/2, Award, paras. 288, 289, 617–18 (Sept. 16, 2015).

[26] Note 7 *supra*.

Remarks by Ibironke T. Odumosu-Ayanu*

I. Introduction

These remarks assess the interconnectedness of investment arbitration and substantive international law and then turns to investor-state dispute settlement's (ISDS) potential contributions to emerging concepts in international law. The analysis draws examples from sustainable development and the social license to operate. While they are matters of general importance and are germane for the determination of rights and responsibilities of states and investors, these two concepts are keenly interwoven with the lives and livelihoods of Third World peoples and Indigenous peoples who have been impacted by international investment law (IIL) since its early days.

II. Investment Arbitration and Interconnections

The relationship between ISDS and international law is being assessed in recent IIL literature.[1] It is trite to observe that international law informs IIL. IIL also has actual and potential influence on substantive principles of international law. There is an interconnectedness between ISDS awards and principles of international law. Beyond reliance of ISDS tribunals on general international law, this interconnection is informed by at least two factors. First, ISDS tribunals are encountering emerging concepts which are more likely to be influenced by tribunals' pronouncements. Second, ISDS is marked by the politics of the international economic system in tangible ways. Pre-2010 investment treaties, which mostly reflect dominant economic perspectives in the international system, continue to largely drive decisions of ISDS tribunals making examination of contributions of ISDS to international law a subject of key importance to the Third World.[2] The response of many Third World states manifests sometimes as resistance, at other times as support, and sometimes as innovation. Essentially, the interconnection between ISDS and substantive international law is complex, multidimensional, and merits assessment that recognizes its context in the broader international system. It provides further impetus for reassessment of the current system of IIL.

IIL's influence on international law is not a new phenomenon. Investment arbitrations of the 1950s to the 1970s reveal a clear, sometimes controversial, influence of arbitral decisions on the direction of substantive areas of international law.[3] These arbitral decisions, for example, fostered the internationalization of state contracts. Often the decisions as well as mechanisms established to administer ISDS have significant impacts on international law matters of utmost significance to Third World states and peoples. The International Centre for Settlement of Investment Disputes, for example, was established partly on the promise of economic development.[4] Instead of concerted engagement with economic development which Third World states had championed in the international system, there has been a turn to sustainable development which the

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[1] *See e.g.*, General International Law in International Investment Law: A Commentary (Andreas Kulick & Michael Waibel eds., 2024).

[2] UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All 71–73 (2023).

[3] *See, e.g.*, Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi 1951, 18 ILR 144; Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic 1979, 53 ILR 389.

[4] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 5 ILM. 524, para. 9 (1965).

international community has favored. Cases such as *Clayton v. Canada* and *Eco Oro v. Colombia* reflect this turn.[5]

Sustainable development in ISDS is a contemporary reflection of interconnections between ISDS, the international system, and international law. Outside international environmental law where sustainable development is a key concept, some investment treaties are beginning to incorporate sustainable development provisions in preambles and other provisions. The Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, for example, includes multiple references to sustainable development.[6] These references feature in the Protocol's preamble and in provisions such as states' right to regulate. Perhaps more significantly, the Protocol provides that investments must, *inter alia*, make a "significant contribution to the host state's sustainable development."[7] Third World states are adopting sustainable development in IIL, in part, as a mechanism for reasserting broader regulatory autonomy and, in some cases, establishing investor obligations. In interpreting the growing number and variety of provisions on sustainable development in investment treaties, ISDS tribunals have the potential to impact the law on sustainable development.

III. Emerging Concepts

Bear Creek v. Peru, a now well-known decision of an ISDS tribunal, addresses interactions between states, investors, and Indigenous peoples.[8] References to these multi-actor interactions in ISDS are not new.[9] What is significant about the *Bear Creek* decision in this regard is its engagement with the social license to operate (SLO). In *Bear Creek*, Philippe Sands refers to social license as "the necessary understanding between the Project's proponents and those living in the communities most likely affected by it, whether directly or indirectly."[10] SLO is not yet (well-)defined in international law. What it entails varies across jurisdictions and as demonstrated by *Bear Creek*, ISDS tribunals have the potential to shape the concept in international law.

In *Bear Creek*, the tribunal raised questions about the standards that inform social license, outlining a five-fold question regarding the laws applicable to, investor obligations and state responsibilities regarding, and implications of, SLO.[11] It connected social license to consultation and consent noting that it is "clear that consultations with Indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities."[12] For the majority in *Bear Creek*, the conduct of the respondent state was relevant to the determination of responsibility.[13] As noted in *Copper Mesa v. Ecuador*, whether the claimant "failed to obtain

[5] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada, PCA Case No 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015); Eco Oro Minerals Corp. v. The Republic of Colombia, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (Sept. 9, 2021)

[6] Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (Feb. 2023).

[7] *Id*. Art. 1.

[8] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No ARB/14/21, Award (Nov. 30, 2017) [hereinafter *Bear Creek*, Award].

[9] Tecnias Medioambientales Tecmed SA v. The United Mexican States, ICSID Case No ARB (AF)/00/2, Award (May 29, 2003).

[10] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No ARB/14/21, para. 6 (Sept. 12, 2017) (partial diss. op., Sands, Prof.) [hereinafter *Bear Creek*, Dissent].

[11] *Bear Creek*, Award, *supra* note 8, para 96.

[12] *Id*., para. 406.

[13] *Id*., para. 412

the required social license to operate . . . and whether such failure was wholly attributable to the claimant" is a relevant "liability issue."[14]

The partial dissenting opinion in *Bear Creek* accentuates the relevant social license issues and allows juxtaposition of an alternative position against the standards that the majority outlined. First, the partial dissenting opinion located investors in ILO Convention 169 which applied to the affected Indigenous peoples.[15] For the dissenting arbitrator, "the fact that the Convention may not impose obligations directly on a private foreign investor… does not, however, mean that it is without significance or legal effects for them."[16] Second, consultation was central to the analysis. In particular, Sands located the duty to obtain a social license in the investor noting that "[i]t may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention 169, but it is not their function to hold an investor's hand and deliver a 'social license' out of those processes. It is for the investor to obtain the 'social license.'"[17] Third, the claimant's "contributory responsibility" impacted damages that would have been awarded.[18] As the "Claimant's contribution was significant and material, and . . . its responsibilities . . . no less than those of the government," the damages were reduced in the partial dissenting opinion.[19]

Bear Creek highlights social license standards, responsibility for obtaining a social license, obligations of businesses under international instruments such as ILO Convention 169, and contributory fault for failure to obtain a social license. It illustrates ISDS tribunals' potential to contribute to the emerging international law on the social license to operate. The incidence of these public interest-impacting concepts before ISDS tribunals highlights fundamental issues regarding the structure of IIL and ISDS which are primarily concerned with the rights of investors and duties of states. In addition, while SLO has been regarded as part of the responsibility to respect human rights,[20] it is not a panacea for the concerns that local communities as well as Indigenous peoples express in international forums. While SLO may appear to be a limited issue, it is often a metaphor for broader issues of participation for local communities and self-determination of Indigenous peoples. As a result, it remains important to pay close attention to emerging concepts such as SLO and the contributions being made in ISDS to their development.

IV. Conclusion

Regardless of the status of ISDS awards in international lawmaking, decisions of ISDS tribunals determine the rights of investors and responsibilities of states. Their decisions also inform the rights of other actors, especially Third World peoples and Indigenous peoples all around the world. Beyond the impacts of specific awards for the parties to investment disputes and the citizens of state parties, contemporary ISDS has the potential to inform the direction of substantive principles of international law. Questions then arise regarding the implications of the influence of a small group of arbitrators on substantive international law.

[14] Copper Mesa Mining Corporation (Canada) v. The Republic of Ecuador, PCA Case No 2012-2, Award, para. 2.16 (Mar. 15, 2016).

[15] International Labor Organization, Indigenous and Tribal Peoples Convention, June 27, 1989, 28 ILM 1282.

[16] *Bear Creek*, Dissent, *supra* note 10, para. 10.

[17] *Id*., para. 37.

[18] *Id*., para. 4.

[19] *Id*., para. 39.

[20] John Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, para. 54, UN Doc. A/HRC/8/5 (Apr. 7, 2008).